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MAR 2 1998
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Fees for Ancillary or Supplementary) MM Docket No. 97-247
Use of Digital Television Spectrum)
Pursuant to Section 336(e)(1)) FCC 97-415
of the Telecommunications Act)
of 1996)

Comments of Thomas C. Smith

I am a technician who has worked in the broadcast industry for over the past 28 years. I am commenting because I have concerns over some of the directions in the management of the radio spectrum by recent and current actions of Congress and the FCC and there effect on small spectrum users. The opinions represented are my own and do not represent the opinions of any other person or group.

OPENING STATEMENT

To many, this notice asks two questions, how much and by what method will those that provide subscription services on a DTV station be charged for the use of the spectrum. But, I believe that this rulemaking has implications beyond that of the collections of fees for subscription use of the DTV channels. At some point, spectrum auctions will take on a reduced role as the amount of spectrum available for auctions decreases. There may be a desire by Congress for ongoing fees for the use of spectrum as the auctioned licenses renew and a method similar to that proposed for DTV may be required. This notice may provide a blueprint for any future spectrum

fee plan.

This notice raises issues on how the value of spectrum is computed. That may be the most important part of this notice. But, Congress may have made the task of determining fair value of spectrum more difficult. I believe that the language of the Telecommunications Act of 1996, that requires this rulemaking, is not written as well as it could have been.

Congress asked that the fees be set to an amount that would have been received in an auction and that they prevent unjust enrichment. I believe that the using auctions as a benchmark is problematic due to the variability of auctions. The use of the term "to avoid unjust enrichment" seems to be anti-free market and would seem that Congress could ask for exorbitant fees for the highly successful operations. A better term would have been "to provide the public, a fair return for the use of spectrum".

VALUING THE SPECTRUM

Determining the value of spectrum is the most difficult part of this rulemaking. The value of spectrum is only one part of the value of any business that uses spectrum. Spectrum is the base and the technology, services offered, marketing, management and other business considerations set the ultimate value of any spectrum based business.

To this point, the value of spectrum has been determined by the outcome of the spectrum auctions. But, as the Commission noted in paragraph 15 of the notice,

that it is difficult to draw comparisons between services in past auctions and services that are secondary to the main use of a spectrum allocation such as DTV. I believe it is even more difficult to use auctions in determining the value of spectrum. Each service has a different value to the user and because of this, each service will earn different amounts of revenue for a give amount of bandwidth. Also, while one would hope a bidder would plan their bidding according to realistic potential revenue and cost projections and compute the value of spectrum accordingly, highly speculative bidding can distort any attempt to set value based on auction pricing. Past problems with auctions such as defaults and bids that were higher or lower than expected make it difficult set value for spectrum based on auctions.

If not auctions, how else can you place a value on spectrum. One way would be on what the government has spent developing the spectrum. Other than managing the spectrum for the past 70 years and the development of some radio technology for the military with government money, the governments investment is quite low compared to other resources. The spectrum was not purchased from another governments or from private parties. It was not gained because of the result of military action. The spectrum was always there and it became available because of the efforts of inventors like Marconi, Fansworth, Armstrong, DeForest and others who developed the early technology.

These factors make it difficult to value spectrum on previous investment by the government.

Government has a long history with leases of government property for things such as cattle grazing and for the right to mine minerals and to log timber. In these cases, government property is bought and either depleted in the case on minerals and oil or has to be restored in the case of grasslands or logging. The spectrum cannot be depleted and only can be filled up temporarily with users. As soon as one transmitter is turned off, another could take its place. Scarcity of space is an issue of the number of users and how the government manages the spectrum. Better management allows for more users and less scarcity. Because spectrum cannot be depleted and the government can collect revenue forever, spectrum should be valued different than other government resources. The real value of spectrum is due to the limitations that determine who receives use of spectrum or of loss of opportunity because spectrum use is deprived because of others having already received that spectrum. The cost of management of the spectrum also sets some of the value of spectrum.

If traditional formulas for selling or leasing property are not suitable, then other models must be examined. The models that seem most appropriate are that of cable franchising, business franchising or licensing. The cable franchise is well known to the FCC as it is the FCC's responsibility to regulate them. A cable franchise allows

the use of public right-away in return for a percentage of gross revenue. Spectrum could be considered public right-away as it allows a number of users to each use a different section of spectrum in the same physical space.

The business franchise allows one to conduct a business using the name and methods according to the rules of the franchiser. Business licensing allows for the use of intellectual property such as the use of music, graphics or trademarks. All of these forms of businesses charge a percentage of gross revenue or profits. Because these forms of business are so prevalent and well know, it should be easy for the Commission to develop a model based on these forms of business for the valuing of spectrum.

Both forms of franchising are similar to FCC licensing. Both types of franchises allow for the right to conduct business for a period of time after which the agreement is renewed and the right can be terminated for failure to meet certain obligations set by the franchise authority.

METHOD OF PAYMENT

The Commission proposed a number of methods for collecting a fee. They included flat fees, percentages of various types of revenue measurements and a combination of flat fees and percentage of revenue. Because I believe the awarding of a FCC license and franchising have much in common, similar fee methods could be used. Most cable and business franchises charge a small percentage of gross revenue as do those who charge royalties for use of

intellectual property such as music licensing and the use of trademarks. This method is well known and use and is understand by most business people. This seemed to be the method the Commission is giving the highest consideration in this notice of proposed rulemaking.

Another method proposed by the Commission include flat fees or a combination of flat fees and percentage of revenue. A form of flat fees may provide to great a disincentive to a station to provide any potential subscription service. The amount of potential revenue for some services or in some markets may not be high enough to make the service profitable and deter experimentation of new services. Setting a flat fee would also be difficult due to the many variables in types of services offered and sizes of markets that stations operate in.

The Commission also proposed setting the fee based on a percentage of profit or net revenues. I believe that would be an auditing nightmare. As the notice stated attributing costs to subscription or non-subscription services may be very difficult.

A fee method that uses a percentage of gross revenues is well, would be the easiest to plan and compute by the licenses and audit by the FCC.

FEE AMOUNTS

The next question is what the amount of the fee should be. This is a difficult question as the government is charging for a non-depletable resource with low development

costs, but has limited access to potential users. But, because the business model that station licenses most resemble are franchises, the fees should probably resemble the franchise fee system.

If spectrum could be consider a form of public right-away that licenses use in a matter similar to cable companies using the public right-away along streets, than the FCC was already determined a maximum fee of 5 percent as that is what the maximum, local governments are allowed to charge.

If a license to use the spectrum is like the FCC awarding a business franchise, then, the fee amount could vary from a flat fee to sizable percentage. According to a listing of business franchises in the January, 1998 issue of Entrepreneur, those franchisers that charge a fee based on a percentage of gross charge from a low of 1 percent to a high of 35 percent for a very few with a average of about 6.3 percent. These franchise fees also include fees for services such as advertising and management training.

Finally the FCC could use a plan similar to the Canadian Radio and Television Commission. They charge all users a administrative fee, like the FCC currently does, to all users of broadcast spectrum and a percentage 1.365 percent of gross that exceeds a certain exemption level depending on the service. The Canadian fee plan is available at www.crtc.gc/eng/legal/licence.

Determining the correct fee amount may be more difficult for the FCC, due to deregulation, the FCC no longer collects revenue and expense information from licenses.

PAYMENT

Fees for the ancillary or supplementary use of DTV spectrum should be a small percentage of gross revenue that the FCC would collect on a yearly basis under it's existing revenue collection methods. The fee rate along with possible adjustments should be established and fixed for the length of the license term so that fee amounts are predictable to the license. This would be similar to the collection of bid revenue from auctions being for one license term.

The FCC could require that any verification of these fees be based on reports from a station's outside accounting firm as the primary method. The FCC should have the right to request an audit by someone of it's own choice, if there is a dispute. Copies of tax returns may not provide the break-out of revenue sources that the FCC may require.

This fee should also be considered a business expense and covered under tax law as such.

SUMMARY

While we do not like the prospect of paying fees, I believe the current political climate leaves no choice and it is probably correct that some fees are paid for use of the spectrum. These fees need to cover the cost

of managing the spectrum. Any fees above that may be difficult to value for both the user and government considering the nature of radio spectrum. As Congress writes laws requesting payment for spectrum, it is difficult to know if the payments are fees, taxes or in the case of auctions, a cashing in of a unexpected opportunity.

I would be more supportive of fees, if the fees went into a trust fund that supported spectrum related costs. Those costs would include the operation of the FCC and the NTIA and other government agencies that manage or use spectrum including grants to local public safety agencies for communications equipment and possibility for supporting public broadcasting and other public and government communications services. With the fees and auction proceeds going the general fund it, they look more like another tax. These costs could than be taken off of the general budget.

I believe the Commission's responsibility is to create rules from these requests from Congress that are fair to both the government, taxpayers, and users and follow traditional business standards for fee collection and valuation. A fee system based on revenue may be the fairest method of charging for use of spectrum and also the most policy neutral.

Respectfully submitted,

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